

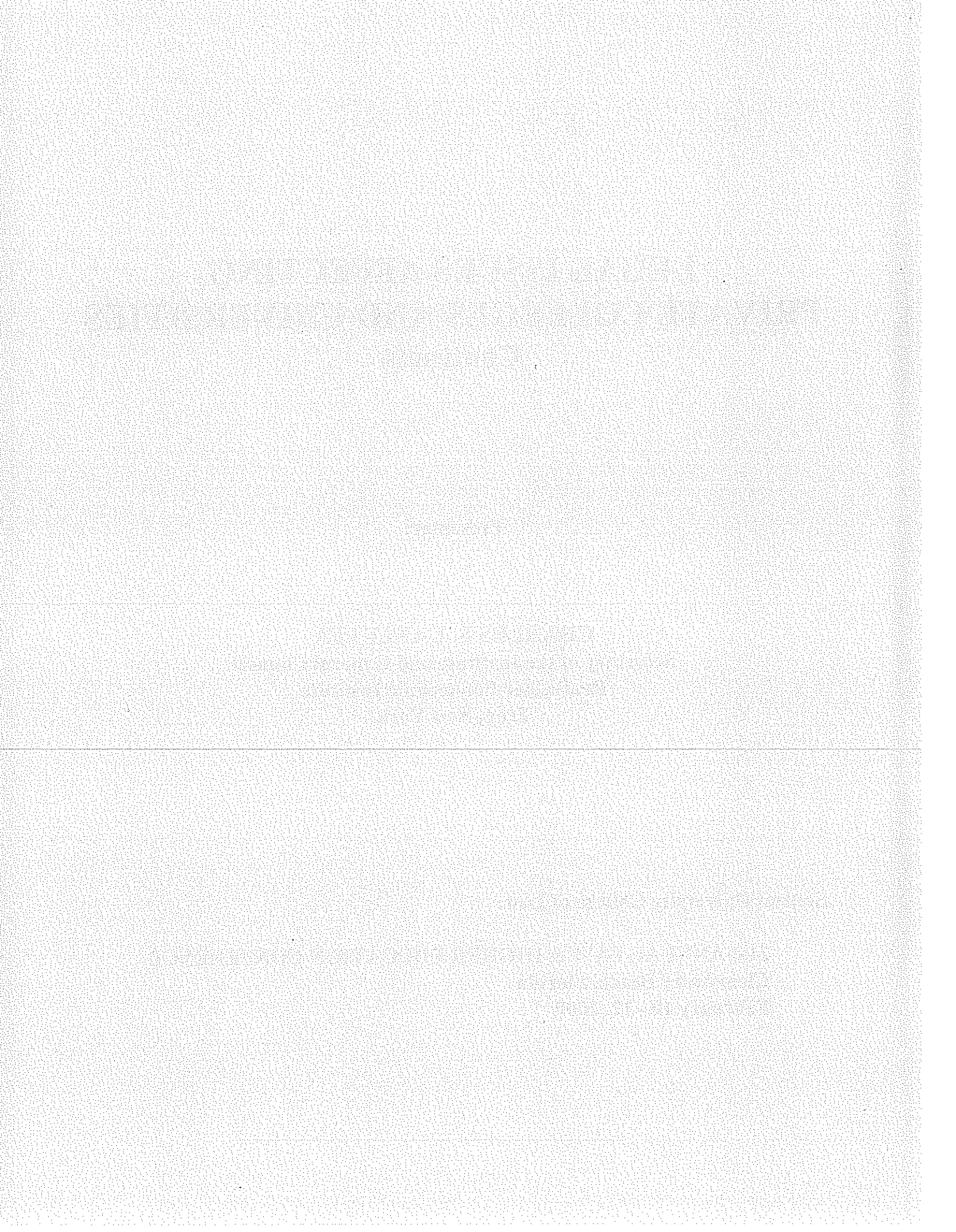
**LEGAL ISSUES AFFECTING
PRIVATE COLLEGES AND UNIVERSITIES
Contracts**

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CONTRACTS

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CONTRACT ISSUES

In every administrator's experience the question comes up about what is a "good contract". Forgetting about the economics of the bargain, this paper focuses either on the validity of the agreement or the form it takes in the course of resolving the various issues involved.

- I. For openers, the first valid question to be asked is what is the subject of the agreement? Put another way, what's the precise item being delivered in fulfillment of the deal between the parties? For instance, if the Buyer thinks they'd be purchasing a machine, what exactly does Buyer believe the machine will do? Is it relevant to the deal what the machine looks like, how much it weighs, what its dimensions are or whether it's table mounted or comes with its own legs? Who installs the unit? Is it relevant where and by whom clothing is made that is sold in the bookstore?¹ Specificity replaces assumptions. If a piece of lab testing equipment must contain no corrosive parts, as per the bid proposal, Seller's entry of a pump that has a metal sleeve in the water line will cause seller to be in non-compliance only if the contract clearly states the non-corrosive parts language. Clear, concise detail, without "legalese" is the best test. I often recommend that the particular "customer" on the campus should draft the specifications about what is desired so that it can be written up within the agreement by the business people only after the business people themselves understand from the language provided them by the customer exactly what it is that's being sought from an outside provider.

- II. Cost This factor should be described in the document not only from the perspective of unit price but also what are commonly hidden items. Who pays for shipping? Is there a discount for early payment or a penalty for late payment? If the item is defective who pays for packaging and shipping back to Seller and redelivery upon repair to Buyer? Is there an import agent required and if so, who pays this

person? Is there a disclaimer of warranty?² Who assumes the risk of liability?³

III. Manner of Payment Avoid paying more than half up front for anything. Avoid paying more than 75% (in the aggregate) upon delivery. Give yourself enough time to test the item after it's installed before you pay the balance of the contract. If you're purchasing software that will interface with some campus-wide operating system already in place, insist that the campus custodian of the operating system be consulted and check off on the process prior to signing the agreement. It is difficult to extract a refund from a software provider after you discover that they can't accomplish a successful interface with your existing operating system...even though the Seller accepted delivery and installation responsibility in the agreement. Your efforts to get a refund will be further hampered by multi-state jurisdictional issues. You may have to sue them in their state.

IV. Authority There is always an issue regarding who has the authority to bind the college to an agreement. The college should have a clearly set forth agency contract policy with specific names or offices it allows to contractually obligate the institution. Some colleges vest only officers with this authority while others use dollar amount demarcations. In any event, the president should clearly enunciate in writing exactly who has what authority.

Furthermore, people executing contracts on behalf of the college should clearly state their agency relationship so as not to assume personal liability for the transaction. A typically correct format for execution would be:

Marlboro Country College

By: _____
James Madison, Vice-President - Finance

Notice that the name of the college is clearly displayed as the entity for which the document is being executed. Furthermore, the inclusion of the title of the person signing the document clearly identifies that person as an officer of the corporate entity.

V. The Parties It is crucial at the beginning of the contract to correctly identify the parties. Not only does this help obviate the issue of correctly setting up the authority of the agent, but it also serves to eliminate internal confusion about who has authority to bind the college, and once bound, who is responsible for owning, maintaining, and disposing the property which is the subject of the agreement.

VI. Student and Faculty Conduct It is almost axiomatic that the relationship between a private college and its students, faculty, and staff is governed by contract theory and contract law. What is less clear to most campuses is the precise language of the contract. William Kaplin and Barbara Lee devote considerable print to the various theories included and I won't reiterate here; but suffice it to say that the college catalog, the student handbook, faculty handbook, residence life handbook, handbook for athletics, affirmative action rules and regulations, rules for borrowing campus equipment and rules for using campus computers are all part of the various contracts.

While these are all published by the campus, they are not often carefully reviewed to analyze what external documents have been incorporated into the college's body of contract by reference. For instance, athletic agreements all incorporate the applicable NCAA rules governing the

division-specific and sport-specific rules for athletics. How many of your inbound first year students and their parents really understand the rules for red-shirting an athlete on an athletic scholarship?

Likewise, your faculty handbook may make reference to AAUP policies and procedures by simply incorporating some AAUP document into the faculty handbook. What precisely are the rules for acquiring tenure?⁴ On careful reflection, this may not serve you well and in fact, may deprive you of the freedoms you cherish as a private institution. Careful drafting can obviate this potential problem.

Footnotes

1. Appendix I Code of Business Conduct
2. Appendix II Disclaimer of Warranty
3. Appendix III Risk Pass Through Documents
 - Indemnification and Hold Harmless
 - Insurance
 - Independent Contractors
 - Code of Conduct for Performing Groups
4. Appendix IV Faculty Handbooks: Tenure Criteria - Collegiality

References

1. Bickel, Robert, The College Administrator and the Courts. (Published by College Administration Publication, Inc.)
2. Carletta, Charles F., Distinctions Between the Criminal Justice System and the Campus Judicial Process: Implications for Public and Private Institutions. (Available from College Administration Publications, Inc. in the book The Administration of Campus Discipline: Student, Organizational and Community Issues, edited by Brent G. Paterson and William L. Kibler.
3. Kaplin, William A. and Lee, Barbara A., The Law of Higher Education. A Comprehensive Guide to Legal Implications of Administrative Decision Making. Third Edition, Jossey-Bass Publishers: San Francisco, California, 1995.
4. The best discussion I've seen on the subject of the rights of the private college and its students regarding discipline is in: Stoner, Edward N. II and Cerminara, Kathy L. Harnessing the Spirit of Insubordination-A Model Student Disciplinary Code 17 J.C. & U.L. No. 2 at 89-121 (Fall 1990).
5. Weeks, Kent M. and Davis, Derek, Legal Deskbook for Administrators of Independent Colleges and Universities, Second Edition, Center for Constitutional Studies, Baylor University and the National Association of College and University Attorneys, 1993.
6. Young, D. Parker and Gehring, Donald D., The College Student and the Courts. (Published by College Administration Publications, Inc.).

APPENDIX I

Code of Business Conduct

Clothing Industries (the “Company”), as a licensee of Rensselaer Polytechnic Institute (“Rensselaer”) operates under a Code of Business Conduct which sets forth the key principles under which it and its subsidiaries or subcontractors are required to operate. The Code of Business Conduct states that the conduct of business with employees, customers, consumers, suppliers and all others shall be based on an honest, fair and equitable basis. It has been and will continue to be the Company’s policy to obey the laws of each country and to honor its obligations to society by being an economic, intellectual, and social asset to each community and nation in which the Company operates.

While some of the Company’s products are manufactured in facilities owned by the Company where compliance with the Code of Business Conduct can be directly assured, it may be dealing more regularly with third-party contractors, particularly in foreign countries.

The purpose of this Code of Business Conduct is to make clear that, taking into account differences in cultures and legal requirements, the Company expects that wherever its products are manufactured they will be manufactured in a manner compatible with the high standards that have contributed to the outstanding reputation of the Company.

1. ETHICAL STANDARDS

The Company pledges that those with whom it contracts for the manufacture of products (“Clothing Contractors”) will operate within a set of ethical standards compatible with this Code of Business Conduct.

2. LEGAL REQUIREMENTS

The Company pledges that it and its suppliers will comply with the applicable laws and regulations of the localities, states, and countries in which they operate.

3. TREATMENT OF EMPLOYEES

All Clothing’s Contractors must fairly compensate their employees, by providing, at a minimum, wages and benefits in compliance with applicable wage and hour laws and regulations. In selecting contractors, the Company will favor those whose policies and practices place reasonable limits on the number of hours that employees may work on a regularly scheduled basis and who regularly provide reasonable rest periods and days off.

All Clothing Contractors must provide their employees with a clean, healthful and safe work environment, and, if applicable, safe and healthy residential facilities.

The Company will not do business with contractors who employ children. For this purpose, the term "child" generally refers to anyone under the age of 14, or under the maximum age for compulsory school attendance if that age is higher than 14, except in the case of legally permissible apprenticeship and similar programs.

The Company will not knowingly do business with contractors who use prison or other forced labor.

The Company will not knowingly do business with contractors who permit the use of corporal punishment or other forms of mental or physical intimidation or coercion.

The Company will favor contractors who provide equal employment opportunities for workers based on their ability rather than on the basis of personal characteristics or religious or other beliefs.

4. INTELLECTUAL PROPERTY RIGHTS

The Company will not do business with contractors who do not respect the Company's or Rensselaer's intellectual property rights in their brands.

5. PRODUCT LABELING

All Clothing Contractors must accurately label products for Rensselaer with their country of origin in compliance with the laws of the United States and those of the country of manufacture.

6. MONITORING

The Company and its subsidiaries will undertake affirmative measures, such as on-site inspection of production facilities, to monitor compliance with the above standards. Clothing Contractors must allow the Company's or Rensselaer's representatives full access to the contractor's production facilities and books and records and respond promptly to reasonable inquiries by such representatives concerning the operations of the contractor's facilities.

BILL OF SALE

PLEASE TAKE NOTICE that I

(hereinafter called "Seller"), in consideration of the sum of NINE HUNDRED and no/100 (\$900.00) DOLLARS paid to Seller by or on behalf of

V { an individual : (hereinafter called "Buyer"), which payment Seller admits having received, hereby sells and conveys to Buyer, his executors, heirs, and assigns forever, the following described good(s):

one (1) 1989 Ford Tempo, 4 door automobile VIN#

Seller COVENANTS and AGREES that Seller is the lawful owner of the good(s) described above and that Seller has the right to sell said good(s) and that such goods are not subject to any liens or encumbrances.

There are no warranties which extend beyond the description on the face hereof except as to ownership or encumbrances. All goods sold and received pursuant to this Bill of Sale are sold, purchased, and received **AS IS** and **WITH ALL FAULTS.**

Seller makes **no warranty of merchantability or fitness for a particular purpose** and Buyer, by accepting all or any part of the goods so conveyed, agrees that Seller has not made and makes no representation or warranty, express or implied, as to merchantability or fitness for a particular purpose and hereby waives, for himself; and anyone claiming through Buyer, any and all past, present, or future claims, including product liability claims against Seller or her heirs, executors or assigns.

Witnesses

By: _____

STATE OF _____)
COUNTY OF _____) ss.:

On the _____ day of July, 1996, before me personally appeared _____ I to me known and known to me to be the same person described in and who executed the within instrument and she duly acknowledged to me that she executed the same.

Notary Public

RISK PASS THROUGH

ADDENDUM TO CONTRACTUAL AGREEMENT

INDEMNIFICATION AND HOLD HARMLESS:

ABC and XYZ agree to defend, indemnify, and hold harmless (College), its officers, trustees, agents, students, and employees, from all claims for bodily injury or property damage arising from or out of the presence of ABC and XYZ, including their employees, agents, representatives, guests, and others present because of the event or ABC and XYZ activities in or about the (College) campus, including the sidewalks, streets, and approaches adjoining the Campus or any portion of the campus used by ABC and XYZ or any of the above stated. ABC and XYZ shall be responsible for all costs of defense, including reasonable attorney's fees, and shall pay all fines or recoveries against (College). ABC and XYZ acknowledge that as a condition precedent to the execution of this Agreement by (College), ABC and XYZ agree that neither shall have any cause of action against (College) for any damage, injury or loss to person or property, from any cause whatsoever, except that which may result from the willful acts of (College).

INSURANCE:

ABC and XYZ shall obtain and keep in force, at their sole cost and expense, public liability insurance, from an approved insurance company authorized to do business in the State of New York, naming both (College) and ABC and XYZ as insured for the period of time included from the arrival of the first participant at the conference or event, and the departure of the last participant. Such policy shall insure all parties against liability for bodily injury and personal injury and against liability for property damages, including liability for damage to property of (College), in amounts of at least Two Million Dollars (\$2,000,000) combined single limit for one occurrence; Auto liability and physical damage in the amount of One Million Dollars (\$1,000,000) and provide Worker's Compensation according to New York State laws. ABC and XYZ shall deliver to (College), at least seven (7) days prior to first arrival of participants, a certificate showing such insurance in effect for the period in question, and showing that the insurance shall not be canceled in any way. ABC and XYZ warrants that its insurance will be primary over any other insurance that (College) might have available to it.

(College)

ABC

XYZ

Date: _____

Date: _____

f:\wpdata\melita\addk.agr

Return to Union

Mail to Address below

Today's date _____

RENSELAER UNION STANDARD INDEPENDENT CONTRACT

The undersigned contractor and purchaser agree to the following terms and conditions for the services herein described below:

Name of Club/Organization _____ Acct # _____

Name of Contractor _____

Fee _____ Dates of Payment _____

Place of Event _____ Address _____

Type of Service _____

Date/s and time/s of service _____

Should report to _____

Additional agreement provisions _____

It is understood that the contractor executes this agreement as an independent contractor and is not an employee of the purchaser.

Contractor agrees to perform and discharge all obligations as an independent contractor under any and all laws, whether existing or in the future, in any way pertaining to the agreement hereunder, including but not limited to social security laws, worker's compensation insurance, income taxes, state employment insurance taxes or contributions, public liability insurance, and to hold purchaser harmless against any such laws as well as against all union claims for welfare payments.

Contractor represents that in performing his/her (their) duties under the terms of this contract, he/she is not infringing on the property right, copyright, patent right or any other right of anyone else, and if any suit is brought or a claim made by anyone that anything in conjunction with the ownership or the presentation of said act or appearance is an infringement on the property right, copyright, patent right or other rights, will indemnify the purchaser against any and all loss, damage cost, attorney fee or other loss whatsoever.

This agreement shall be governed by the laws of the State of New York. The purchaser, in signing this contract warrants that he/she signs as a properly authorized representative of the Institution and does not assume any personal liability for meeting the terms of the contract.

Signature _____ Date _____

Name _____

Permanent Address _____

Social Security or Federal ID _____

Signature (RU Rep) _____ Date _____

RISK PASS THROUGH

Code of Conduct for Performing Groups

This agreement is hereby made between _____ hereinafter referred to as "the band," and _____, for the artist's engagement on _____ in the _____ Room of the _____ Union at _____, in _____, New York.

Whereas the _____ Union is accustomed to contracting professional bands through a contractual agreement that establishes a code of conduct for their performing group, the _____ Union will insist that all members of the band conduct themselves in a professional manner, taking responsibility for the behavior, actions and words of each member of the band as well as the responsibility for the behavior of the audience as directly attributed to the actions of the band as undersigned below during the performance. This behavior includes, but is not limited to:

- a. Moshing
- b. Stage Diving, and
- c. Body Passing.

The band as undersigned below agrees not to encourage or promote such activity which can lead to injuries, damages or losses. If the band encourages or promotes such activities they must defend, indemnify and hold harmless _____, its officers, trustees, agents, employees and students, from and against all claims, lawsuits, proceedings (administrative or otherwise), losses, penalties, damages, costs, charges, and other expenses of every kind, including reasonable attorneys' fees and litigation expenses which may arise by reason of injuries, including death and property damage, incurred during the band's performance.

Agreed and Consented to:

Band Leader*

The Band

Date

* Signature implies explicit and clear communication of responsibilities to all members of the band performing at this event.

FAWPD\MELITA\PERFORM.AGR

APPENDIX IV

FACULTY HANDBOOKS: TENURE CRITERIA-COLLEGIALITY

“Collegiality” has been defined as “the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests.” Mayberry v. Dees, 663 F 2nd 502 (4th Circuit 1981)

The concept of whether “collegiality” may be used as a factor in tenure decisions is a relatively hot topic. However, resolution depends in a large part upon whether or not the subject of the challenge is a private university action or public university action.

In the private university setting, it is established, at least in New York, that the legal framework upon which decisions to grant or deny tenure will be the “contract” between the teacher and the school which defines the right to obtain tenure. This can be either an express contract, or an imposed contract such as in a faculty handbook or other rule or regulation of the school. Since private universities do not engage in “state action” sufficient to submit themselves to the jurisdiction of the Federal Courts for the purpose of due process or equal protection claims, the major claims advanced in tenure litigation (aside from discrimination claims which will be discussed in more detail later) essentially is pertained as to whether the school reasonably complied with its contractual obligations to consider tenure as they are published and practiced.

Furthermore, the Courts have steadfastly insisted the school should be provided with the widest of latitudes in tenure decisions, insisting that the Courts must not become some kind of “super tenure” body, examining the minute details of each tenure decision. Instead, the Courts will look only to insure that the tenure decision was rationally based, and if it is so determined, will defer to the school’s decision in the usual case.

Court cases which discuss “collegiality” in this context are twofold. The first set of cases discuss whether or not “collegiality” may be used as a factor in tenure decisions where the actual tenure criteria does not specifically list collegiality as an explicit factor to be considered in the process. Almost uniformly, the Courts hold that collegiality is so basic and fundamental to the process that it can be considered even when not explicitly listed. For example, in Bresnick v. Manhattanville College, 864 F Supp 327, 95 Ed. Law Rep. 121 (USDC, SD New York 1994) the Court, applying New York law, held that Collegiality was a permissible factor for determining tenure decisions, even where not explicitly listed as a criteria, with the Court observing that collegiality was, in fact, an “essential” element for tenure decisions. See also Stein v. Kent State University, 181 F 3rd 103 (6th Circuit 1999) which surveys relevant court holdings on the subject, and making the observation that courts often find that collegiality, even when expressed as an explicit factor, is

inherently raised when factors such as “teaching” or “services” is raised as a criteria.

The second series of cases, less relevant to private universities, considers the question of whether or not a tenure hopeful free speech rights might be chilled as a result of a requirement to measure the “collegiality” of that applicant. Put more precisely, the question distills to whether the right of a professor to take unpopular positions might be categorized as “insubordination” or “lack of collegiality” and thus deprive the professor of otherwise available tenure rights. As to this point, courts historically seem to attempt to strike a balance between what it perceives as the coordinate goals of allowing academic freedom while at the same time recognizing the critical importance of measuring collegiality in what would often be the small environment of academic departments of the university. The courts seem to attempt to recognize that a teacher, absent of making a false or fraudulent statements, should not be disciplined, under the rubric of “insubordination” or “lack of collegiality” for merely expressing protected opinion.

Note that the actual applicability of this latter doctrine to private universities is, at best, questionable. Private universities, unlike public universities, do not engage in “state action” and therefore cannot be sued by a disgruntled professor based upon some deprivation of a constitutionally protected right. As before, the only rights that a professor would have against a private university would be those expressed in a contract.

For private universities, the biggest concern about collegiality is the fact that, unlike many other factors, collegiality is an “inevitably” subjective factor in tenure decisions. Because of that, any claim by a teacher that he or she was discriminated against would therefore inevitably center on these types of subjective determinations. In fact, examination of tenure cases reveal quite a number of cases where the disgruntled tenure applicant has, in essence, alleged that the school’s determination of “lack of collegiality” was in fact a pretext for discrimination.

Therefore, the biggest problem with using collegiality as a factor is not that it is a suspect classification. Clearly, the courts hold that it is not. However, since it is, by its very nature, inevitably a subjective determination, a tenure determination which rests, even in part, upon an adverse determination regarding collegiality, opens itself up to a potential discrimination claim in a proper case.

It would thus appear that, in order to minimize potential risk regarding potential tenure determination litigation, particularly for allegations of discrimination, it might be appropriate for the school that chooses to specifically add collegiality as a listed criteria in its contract to also list various factors which would describe a detailed determination with regard to collegiality. Obviously, the more detailed a determination is with regard to why it is that a particular tenure applicant is not suitably collegial, with specific examples provided, the more difficult it would be to prove that such a determination was pretextual.